

No. 11382.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and
JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLANTS' PETITION FOR REHEARING.

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FILED

DEC 16 1947

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

JL P. O'BRIEN, CLERK

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*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

Appellants William Shubin, Frederick Alexander Shubin and Jack L. Kissel respectfully petition for a rehearing after decision rendered by this Court on the 1st day of December, 1947, affirming the judgment of the District Court of the United States for the Southern District of California, Central Division.

The grounds of such petition are as follows:

1. The decision of this Court, to the effect that there was no error in permitting testimony of a revenue agent as to oral admissions made by the appellants, even though such agent had refreshed his memory from the inadmis-

sible written transcripts of such admissions before testifying, is premised upon an incorrect concept of the record, and it disregards the provisions of the statute forbidding such testimony under any circumstances.

The opinion states:

“It is not claimed that the testimony in any manner varied from the information they possessed before reading the statements prior to testifying.”

On the contrary, appellants have always contended that when a witness makes use of an illegally obtained, and therefore inadmissible document, for the express purpose of refreshing his memory, that this vitiates his entire testimony on the subject matter. In such circumstances, the courts cannot speculate, nor can they permit the witness to speculate on what he would have remembered if he had not looked at the documents for the sole purpose of refreshing his memory. Furthermore, the oral testimony of the agents was inadmissible regardless of whether they refreshed their memories, because the statute so provides.

2. The statement in the opinion that appellants' admissions to the revenue agents were “free and voluntary,” ignores the evidence to the contrary, and disregards the trial court's error in precluding a full inquiry into whether appellants had voluntarily made such admissions. This point is entirely independent of the preceding one, as it was not concerned with whether or not the appellants' admissions were voluntary.

3. The admissions which the revenue agents testified to were admissions of the individual appellants separately made by each out of the presence of the other, and were in no sense partnership admissions as this Court seems

to imply by the following statement: "There is no force to the contention that because the operations of the individual partners were so interwoven with the operations of the partnership that in dealing with partnership affairs actions of the individuals were unavoidably disclosed and hence the whole affair should be clothed with secrecy, otherwise the income tax returns of the individual partners would be made public." This point is likewise independent from both of the preceding ones.

I.

The Rule Prohibiting the Use of Illegally Obtained Documents Must Necessarily Include Any Use in Obtaining a Conviction.

This Court in its opinion says:

"The agents used the statements made by the individual partners to refresh their memories. This action it is claimed rendered their testimony incompetent on the oft-repeated ground that individual partnership income tax returns were being introduced into evidence in a roundabout way. The information testified to by the revenue agents was known to them at the time the admissions were made. It is not claimed that the testimony in any manner varied from the information they possessed before reading the statements prior to testifying."

As we understand this, it would have been error if it had been shown that the agent *actually did refresh his memory*, but that it is not sufficient to show that the agent *read them for the purpose of refreshing his memory*. Regardless of the basis for such a distinction, we wish to point out that appellants were prevented by the trial court

from ascertaining the extent to which the agent Bircher had refreshed his recollection by reading the written statements of appellants.

The trial court permitted appellants' counsel to examine Mr. Bircher on *voir dire* and the record of this shows that he had read all three of the appellants' statements before testifying. Some examples of this are quoted on pages 33, 34, 38 and 39 of Appellants' Opening Brief.

As to William Shubin, he testified:

“Q. By Mr. McLaughlin: Mr. Bircher, before you testified this morning you read those statements, didn't you? A. I have read them partly. I don't know that I have read them completely and I don't know that I have even read them completely now, but for a long time I have had the substance of all of them in mind.

Q. How many times did you read them immediately prior to your testimony this morning, or any parts of them? A. Oh, I would say six or seven times; in fact, I read them over once or twice before they were signed, during the time they were being reviewed by the defendants, and I have read them over during the time I was writing reports pertaining to them. I have read them over a number of times.

Q. Did you read any of those three statements clear through just immediately before you took the witness stand this morning, within the last two or three days? A. I think I read over the first one, that is the one of William Shubin, but I don't think I read over either of the other ones completely through. I have merely glanced at them.

Q. Which one did you read this noon? I looked them all over merely casually.

Q. What evidence were you trying to refresh your mind on that you did not know?

Mr. Strong: I don't think that is a proper question.

The Court: Well, I will permit it.

A. I didn't have any particular fact in mind. I just thought that I might refresh my recollection. We discussed many things, of course, during those interviews. It extended quite a period of time.

“Q. By Mr. McLaughlin: Are you able to state what facts you can testify to today if you had not read those statements within the last few days?

Mr. Strong: I don't think that is material, Your Honor.

The Court: That is a conclusion. I don't suppose any witness would know how to answer that. Continue, if you have any other questions. [R. 400-401.]

As to Frederick Shubin, he testified:

“Q. Before you came to court this morning did you look at the statement of Frederick Shubin? A. Yes; I reviewed them all last night casually.

Q. Well, when you say ‘casually’ do you mean you read them or you did not? A. I read portions of them, maybe turning the first page and then jumping to the fifth page, just kind of to refresh my memory a little bit. I didn't read them thoroughly.

Q. That was last evening? A. That is correct.

Q. Prior to last evening, how long was it since you read them? A. Probably four or five days or a week that I casually looked them over. I haven't looked them over thoroughly for many months.

Q. Well, ever since this proceeding has been going on you have been refreshing your recollection or looking at them from time to time, haven't you? A. Yes.” [R. 418-419.]

As to Jack Kissel, he testified:

“Q. By Mr. McLaughlin: Mr. Bircher, at that time there was transcribed a statement of the questions and answers, was there not? A. That is correct.

Q. And you have that statement? A. Yes.

Q. And did you look at it this noon? A. Yes, casually. I mean I didn’t read it fully.

Q. Well, how long did you spend looking at it? A. Probably three minutes to five minutes.

Q. Did you look at it before you came to court this morning? A. Yes; last night.

Q. Did you read it through last night? A. No. I haven’t read it through, I don’t think, in months.

Q. Well, how many months? A. Well, it is about eight months, I guess.”

* * * * *

“Q. Then, it was after this time that you made your report of the income tax. Did you also read it after you received the letter from the Commissioner of Internal Revenue? A. Yes; that is right.

Q. The reason that you read it, the reason that you looked at the statement on this occasion and the reason that you looked it over last night was to refresh your recollection, wasn’t it? A. Yes.” [R. 424-426.]

The vice of permitting such testimony after the witness has refreshed his recollection from an illegally obtained document is the impossibility of his, thereafter, being able to accurately state all that he knew before he refreshed his recollection. This is doubly true where this witness has made a habit of periodically reading these statements. How could he possibly be able to know how much he would have remembered at the time of the trial if he had not con-

stantly been fortifying his memory by rereading these statements? It is like asking a lawyer how much law he would have remembered if he had retired from the practice ten years ago.

The courts should not have to speculate on whether or how much such rereading refreshed the witness' memory. This is particularly true where the witness had read the statements on several occasions since they were given. The effect of this was to keep his memory refreshed regardless of what his purpose was in reading them. The obvious and admitted purpose in rereading the statements was to refresh the memory. It was not mere curiosity or love of literature which prompted such constant rereading. If the witness knew everything that was in them he wouldn't have been curious.

The only safeguard in such instances is to automatically disqualify the witness who has made any use of such inviolate documents. Here, the statute prohibits the testimony of these agents in any event, and the Commissioner of Internal Revenue has no power to waive its provisions.

Even though he had not read, or refreshed his recollection from, the returns Mr. Bircher's testimony was nothing more than an oral statement of appellants' admissions which had been transcribed and filed as supplemental returns. Under such circumstances he had no more right to testify to such than the government had to introduce the written transcripts. Neither had Mr. Eustice any right to testify to facts he ascertained in preparing his reports to the Internal Revenue Office.

The trial court properly held the written transcripts inadmissible because they had not been obtained pursuant

to the Treasury Regulations. It held that the Commissioner of Internal Revenue had no power to waive compliance with such regulations.

This Court has not ruled to the contrary, but it has overlooked the fact that the Commissioner had no power to permit his agents to give oral testimony either.

The testimony that Mr. Bircher gave was what he heard when these written statements were being given before his shorthand reporter for transcription. [R. 267-271 and 372-373.] Mr. Eustice testified that his interviews with appellants were to enable him to prepare a report to the Internal Revenue Department and file it in connection with their returns. [R. 318 and 344.] Suppose that appellants had come into the Internal Revenue Office to have an agent help prepare their original returns, could the rule as to secrecy be circumvented by having the agent testify to what they told him to put down on such returns?

We do not need to speculate on the answer to this because the statute not only precludes the use of returns and of supplemental returns such as these written statements and Mr. Eustice's report, but it prohibits the agents from orally disclosing anything that is a part of these.

Subdivision (f) (1) of Section 55, U. S. C. A., Title 26, provides:

"It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit

any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law;”

This section does not authorize any government official to permit the agents to divulge such matters orally. The only section vesting any such authority is Subdivision (a) (1) of Section 55, and this is confined to the use of written returns and reports.

Subdivision (a) (1) of this Section 55, provides:

“Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.”

All the applicable Treasury Regulations are set forth on pages 27 to 29 of Appellants’ Opening Brief and there is nothing in them permitting such oral testimony from the revenue agents. If they had attempted to do this, they would have gone beyond the provisions of the statute.

The further reason that the oral testimony of the agents was inadmissible was that neither the Attorney General’s request to the Commissioner nor the Commissioner’s written permission included any reference to these appellants or to their returns. [R. 273, 311 and 312.] This is why the trial court excluded the written statements, and for each of the reasons herein set forth, it should have excluded the oral testimony of these agents. (See references to the record on this phase of the case on pages 30, 31 and 53 to 63 of Appellants’ Opening Brief.)

II.

The Record Shows That Appellants' Statement to the Internal Revenue Agents Were Not Free and Voluntary but Were Qualified in Each Instance.

Under the preceding subdivisions we have demonstrated that the agents were precluded from testifying even though the appellants' admissions were free and voluntary, because the statute prohibits such. Furthermore, even if the statute had intended to permit such testimony pursuant to an applicable Treasury Regulation if there was such (which there is not), the government counsel never requested the Commissioner to permit their testimony as to any of these three appellants. [R. 273-274 and 277-279.]

Assuming that there is any answer to our argument thus far, we come now to the question whether appellants did waive their statutory immunity from such evidence. Before discussing this point we wish to emphasize that nothing in this Section 55 of Title 26, U. S. C. A., nor nothing in the Treasury Regulations permits the taxpayer to waive strict compliance with such statute and regulations. Assume, however, that he could waive it, did any of these appellants do it?

Mr. Bircher testified to nothing except what he heard when these statements were being transcribed by his reporter. [R. 267-270 and 372-376.] He testified that he advised appellants fully as to their constitutional rights to refuse to answer any of his questions. The appellants do not dispute this, but they contend that in spite of this admonition, they understood that their answers would not

be used in any O. P. A. proceeding or investigation involving them.

Mr. Bircher does not expressly admit or deny this. He says:

“Yes, at one of those conferences there was some discussion off the record but where that occurred it shows on the transcribed record, and that was in connection with the advice of their attorneys regarding their admonition. That is the only conversation that occurred off the record.” [R. 375.]

Appellants sought to show that prior to the giving of their statements their tax counsel had obtained the assurance from Mr. George D. Martin, the Internal Revenue Agent in Charge of the Los Angeles office, that the information given by appellants would not be used against them in any O. P. A. litigation. The trial court refused to permit such testimony. [R. 460-462.]

The trial court, likewise, refused to permit Mr. Brady to testify as to his prior discussions with Mr. Bircher regarding this matter. [R. 463-464.] It relaxed its ruling slightly after government counsel had gone into the question, but only to permit Mr. Brady to state his understanding with Mr. Phoebus at the time appellants signed their transcribed statements.

His testimony on this is as follows:

“Q. Mr. Brady, you said that they signed those statements after reiteration of the assurance. Would you state what was said and who said it A. Mr. Bircher was there in the early part of the morning.

He was not there at the time the statements were signed, but before they were signed, I turned to Mr. Phoebus who was there and I said to Mr. Phoebus: 'It is the understanding, is it not, that these are for the eyes of the Treasury Department only?', and he answered, to my recollection, 'Yes.' "

Mr. Eustice testified to admissions that appellants had made to him when he was at their plant checking their records. He admits that he never cautioned appellants that their answers might be used against them. His testimony in this respect was as follows:

"Q. By Mr. McLaughlin: Mr. Eustice, on any of the conversations that you had with any of the defendants at this place of business, did you tell them that what they told you might be used against them in any criminal proceedings? * * *

The Witness: Yes, sir. I don't recall at any time.

Q. By Mr. McLaughlin: You have no recollection of ever having cautioned them that the things that they told you might be used against them in some proceeding brought by the government? A. No; not regarding these particular items. Whenever they came up, I just asked the questions which I was authorized to do.

Q. Yes. A. In an income tax investigation, I didn't warn them at every time that that might be used in another investigation.

The Court: Now, you qualified that. You say you did not warn them every time. Did you warn them at any time? That is what counsel is interested in. Did you warn them at any time?

The Witness: I didn't warn them at any time."
[R. 357-358.]

Both the agents, Samuel J. Phoebus and Walter E. Schlick, who had assisted Mr. Eustice, testified that they had given some assurance to appellants as to the inviolate character of testimony for the government but upon being called by appellants' counsel, they testified as follows:

"Q. Now, state what was said. A. Bill Shubin expressed the fear that the matters which we were discussing would be revealed to the O.P.A. and I told him that regardless of the origin of the funds or what illegitimate business the taxpayer might be in that it was the policy of the Bureau to consider these returns confidential, and either on that occasion or another occasion I pointed out to him that even in court that I could not testify in relation to the things which he was telling us unless I was authorized to do so." [Phoebus, R. 449.]

"Q. Will you state what you said and what they said as near as you can? A. The conversation was relative to the confidential matters which were being discussed at that time which, of course, so far as we were concerned, was merely income tax matters and the defendants were concerned about the information becoming common knowledge to the O.P.A. officials.

"We could not conscientiously assure them that the information would never be made known to them, but we did say that it is the policy of the Bureau to not divulge that information, that information given in the course of a tax investigation is inviolate and is confidential and should not be revealed to anyone except those authorized by the Treasury Department." [Schlick, R. 452.]

It is not appellants' contention that these agents could waive the provisions of any statute or regulations. Ap-

pellants contend that neither the Internal Revenue agents nor appellants could waive any such provisions. The government contends that appellants could and did waive their immunities. Appellants contend that, even if they had the power to waive such immunities, that such waiver would have to be clear, unqualified and unconditional. There is no evidence of such a waiver that meets the requirements stated in *Johnson v. Zerbst*, 304 U. S. 458 at 464; and *Glasser v. United States*, 315 U. S. 60.

III.

The Fact That the Revenue Agents Were Investigating the Partnership Returns as Well as the Individual Returns of Appellants Is of No Consequence.

This Court states in its opinion:

“There is no force to the contention that because the operations of the individual partners were so interwoven with the operations of the partnership that in dealing with partnership affairs actions of the individuals were unavoidably disclosed and hence the whole affair should be clothed with secrecy, otherwise the income tax returns of the individual partners would be made public. The agents used the statements made by the individual partners to refresh their memories. This action it is claimed rendered their testimony incompetent on the oft-repeated ground that individual partnership income tax returns were being introduced into evidence in a roundabout way.”

At the trial, government counsel contended that appellants' written statements were admissible because the revenue agents were investigating the partnership returns.

Appellants' counsel has never been able to understand what difference this would make even though it were wholly true.

We are still confronted with the erroneous admission into evidence of statements made by the individual appellants, which were obtained from the Revenue Office and testified to by revenue agents contrary to the express provisions of Section 55, U. S. C. A.

If there could be any significance to such a distinction, then we respectfully direct this Court's attention to the testimony of both Mr. Eustice and Mr. Bircher that they were investigating the individual returns of the appellants as well as their partnership returns. [R. 343-344, 375 and 405.]

Conclusion.

Regardless of whether the record shows the commission of any crime, appellants are entitled to a reversal if prejudicial error was committed in the trial court. They were convicted on evidence that should have been excluded, and the conviction should therefore be reversed.

This Court in the recent case of *Meeks v. U. S.*, 163 F. (2d) 598, in reversing a murder conviction, said at page 602:

"Apart from these three errors, it is true that there was other evidence strongly adverse to appellant which the jury may or may not have believed. However, the Supreme Court does not permit an appellate court to speculate as to what witnesses the jury would believe or disbelieve. Indeed, in view of the fundamental character of these errors *we may not affirm, even if we are 'without doubt' of appellant's*

guilt. In the recent case of *Bollenback v. United States*, 326 U. S. 607, 614, 615, 66 S. Ct. 402, 406, 90 L. Ed. 350, that Court, in reversing on an error in the trial court's instruction, stated '* * * In view of the Government's insistence that there is abundant evidence to indicate that Bollenback was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that *the question is not whether guilt may be spelt out of a record*, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. * * * From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' *if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty.* In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.' (Emphasis supplied.)"

We respectfully submit that for the reasons stated a rehearing should be granted.

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By JAMES A. McLAUGHLIN,

Attorneys for Appellants and Petitioners.

Certificate of Counsel.

The undersigned counsel for the appellants and petitioners above named hereby certifies that in his judgment the foregoing petition for rehearing of the above named appellants is well founded and that such petition is not interposed for delay.

JAMES A. McLAUGHLIN.

